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In the Supreme Court of the United States

..... TERM, 1969

JOHN O'C. FITZGERALD and CHARLES F. MARINO,

Petitioners,

vs.

LEE A. FREEMAN and RICHARD F. LEVY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, John O'C. Fitzgerald and Charles F. Marino, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

CITATIONS OF OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in 409 F.2d 427 (1969). It is shown in the Appendix to this Petition as Exhibit A. No opinion of the district court is reported, but it is also shown in the Appendix to this Petition as Exhibit B.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 25, 1959.

IN RESPECT OF A HEARING

On March 11, 1969, an order was entered in the Court of Appeals extending the time to file a Petition for Rehearing until March 24, 1969. On March 24, 1969, a Petition for Rehearing was filed. On May 9, 1969, an order was entered denying Rehearing.

STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT

The statutory provision believed to confer jurisdiction on this Court is U. S. C. A. Title 28, Section 1254 (1).

QUESTION PRESENTED FOR REVIEW

Should this Court grant certiorari to review the action of the Courts below in setting aside, *contrary to the decisions of this Court,* a contingent attorney's fee contract where, as here,

(1) the client never complained that the contract was obtained by fraud, mistake or undue influence or was oppressive or extortionate (or even that the fees specified therein were unreasonable); and

(2) the pleadings raised no issue, the record contains no evidence and the district court made no finding that the contingent fee contract was tainted with fraud, mistake, undue influence, oppression or extortion; and

(3) the district court, *sua sponte,* decided that the contingent fee contract was in some way inconsistent with Canons 13 and 34 of professional ethics and arbitrarily awarded the Petitioners fees based on quantum meruit.

STATUTE AND CANONS OF ETHICS INVOLVED

1. The Statute involved in this case is the Illinois Attorney's Lien Act, Chapter 13, Section 14 of the Illinois Revised Statutes. So far as is pertinent here, it reads as follows:

> "Attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection or upon which suit or action has been instituted, *for the amount of any fee which may have been agreed upon by and between such attorneys and their clients* or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action" (Emphasis Added).

2. The Canons of Ethics involved in this case are:

> "Canon 13, *Contingent Fees*
>
> A contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.
>
> Canon 34, *Division of Fees*
>
> No division of fees for legal services is proper, except with another lawyer, based upon a division of service and responsibility."

STATEMENT OF THE CASE

The Petitioners, John O'C. Fitzgerald and Charles F. Marino (Fitzgerald and Marino), are attorneys. Beginning in 1957, the Petitioners, together with two other attorneys, Joseph Keig, Sr. (Keig) and Victor Neumark (Neumark), represented Radiant Burners, Inc., (Radiant) in a treble damage anti-trust suit against the American Gas Association (AGA) and several of its members which arose from AGA's unlawful refusal to approve a gas burner manufactured and sold by Radiant.

On March 11, 1959, Judge Philip Sullivan of the federal district court for the Northern District of Illinois dismissed Radiant's Complaint for the third time on the ground that it failed to allege a public injury. An appeal was taken to the United States Court of Appeals for the Seventh Circuit. On December 3, 1959, the Court of Appeals affirmed the dismissal of the Complaint, and the Petitioners, together with Keig, petitioned this Court for a Writ of Certiorari. Certiorari was granted by this Court, and the dismissal of Radiant's Complaint was subsequently reversed by this Court in 364 U.S. 656 (1960).

Judge Philip Sullivan died while the case was on Appeal, and, upon it being remanded to the district court, it was assigned to Judge William Campbell.

Radiant then decided to retain Respondents, Lee A. Freeman and Richard F. Levy (Freeman and Levy) to handle the case upon its return to the district court for trial. On December 20, 1960, Fitzgerald, Keig and Neumark entered into an agreement with Radiant which provided that Fitzgerald and Keig, collectively, would re-

ceive for legal services performed by them from the outset of the case to that date an amount equal to 11¼% of all monies, property and other things of value received by Radiant by judgment, settlement, compromise or otherwise (a copy of the contract is shown in the Appendix to this Petition as Exhibit C). Thereafter, on April 19, 1961, Fitzgerald and Keig entered into an agreement with Marino, to divide their fees as follows: Fitzgerald 5 1/16%, Marino 1 1/8% and Keig 5 1/16%.

Shortly prior to October 1, 1965, AGA approved Radiant's gas burner and on that date the treble damage anti-trust suit was settled and dismissed by Judge Campbell. Radiant received $450,000.00, of which Freeman and Levy took 50%, namely $225,000.00 as attorneys fees plus $35,000.00 in expenses. They divided the fees and expenses between themselves and Neumark, who is Levy's father-in-law. However, Radiant, Freeman and Levy refused to pay the Petitioners the amount due them.

Prior to the settlement, the Petitioners gave written notice to Radiant, all Defendants and all attorneys in the treble damage anti-trust suit of their attorney's lien. The Petitioners then filed a Petition in the district court before which the treble damage anti-trust suit had been pending to enforce said lien against the Defendants. Respondents, Freeman and Levy then personally entered the case. They alleged that they had agreed to indemnify the Defendants in this matter. Freeman and Levy were permitted by the district court to intervene over the Petitioner's objection.

Neither Radiant nor any of the Defendants took any part in the attorney's lien proceeding. Respondents, Freeman

and Levy answered the Petition to Enforce the Attorney's Lien alleging that nothing was due the Petitioners because the Petitioners had breached the contingent fee contract, dated December 20, 1960. Respondents, Freeman and Levy also alleged that Petitioners were guilty of laches, that their right to fees had been released by Keig, when he alone assigned his fees to Freeman for $1,000.00 and executed a Release, dated February 6, 1962, and that, if anything, the Petitioners contingent fees should be based on the net amount received by Radiant, namely $190,000.00 after paying Freeman and Levy $260,000.00. At no time has Freeman and Levy, Radiant, or the Defendants in the treble damage anti-trust suit alleged that the contingent fee contract was procured by fraud, mistake, undue influence, or was oppressive or extortionate, or even unreasonable.

The Petitioners and Freeman and Levy entered into a stipulation of facts which was filed with the district court on December 1, 1966.

Judge Campbell of the district court then filed a Memorandum, Findings of Fact, Conclusions of Law and Order, in which he declined to rule on the defenses raised by Freeman and Levy relating to breach of contract, laches and release, but instead declared that he was concerned about the contingent fee contract being inconsistent with Canons 34 and 13 of the Canons of Ethics which relate to division of fees and contingent fees. Accordingly, Judge Campbell set the fees of the Petitioners at $17,500.00, and said:

> "However, these litigants are members of a calling over which this court has supervisory responsibilities and powers and whose business dealings are not limited to the ordinary rules of contracts, but must also comply with the canons of professional ethics.

Even assuming that a valid contract existed between Keig, Fitzgerald and Radiant Burners which effected the substitution of intervenors Levy and Freeman, still I shall not enforce a lien arising from the agreement should it be in anyway inconsistent with the canons of professional ethics. I am concerned here with two of said Canons:

Canon 34, Division of Fees

> No division of Fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.

Canon 13, Contingent Fees

> A contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

In observance of these Canons, I am more concerned with the value of services or responsibilities which have been contributed to the successful completion of this cause, than with the specific terms of an agreement.

The stipulation filed herein sets forth the extent Attorneys, Freeman, Levy and Neumark, have been compensated for their services. As to the value of the services rendered by all parties, I am fully aware of the proceedings which took place before me and which were handled almost exclusively by intervenors, Freeman and Levy. I have carefully reviewed the stipulation of the parties relating to the services performed by petitioners as well as the full file of this court and the Court of Appeals. I am also fully aware of the initial risk and uncertainty of compensation in this case, and of the nature and value of the recovery in question and the extent that all attorneys of record contributed to the realization of that recovery.

> Based on these facts and considerations, and in furtherance of my responsibility to supervise the reasonableness of the fees in this case, the court sets attorneys fees for petitioner, Fitzgerald, in the amount of $17,500, without interest. Petitioner Marino is to be compensated by Fitzgerald in accordance with the terms of their agreement.
>
> It is further ordered that the above sum is to be paid to petitioner by each of the attorneys who have received compensation from respondent, Radiant Burners, Inc., i.e., Freeman, Levy and Neumark, in direct proportion to the compensation received by each of them."

Petitioners then appealed Judge Campbell's order to the United States Court of Appeals for the Seventh Circuit. They requested that Judge Campbell's order be reversed and the Petitioners' fees be set in accordance with the contingent fee contract. Respondents, Freeman and Levy, took a cross-appeal. In their brief and argument to the Court of Appeals, Freeman and Levy also urged that Judge Campbell's order be reversed, but they contended that the Petitioners were entitled to nothing, or in the alternative to their respective percentages of $190,000.00, that being the amount received by Radiant after paying Freeman and Levy. Nonetheless, on February 25, 1969, the Court of Appeals affirmed Judge Campbell's order based on quantum meruit rather than upon the contingent fee contract and rejected the "all or nothing" legal issue presented by the pleadings in the district court, as well as the briefs and argument to the Court of Appeals. Interestingly, the Court of Appeals found that the defenses raised by Respondents, Freeman and Levy were "unpersuasive". The Petitioners filed a Petition for Rehearing on March 24, 1969, which was denied by the Court of Appeals on May 9, 1969.

THE BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The Petition to enforce the attorney's lien was filed in a treble damage anti-trust suit over which the district court had jurisdiction by virtue of Section 4 of the Clayton Act, U.S.C.A. Title 15, Section 15.

REASONS WHY THE WRIT SHOULD BE GRANTED

There are three important reasons why the Writ of Certiorari should be granted in this case:

FIRST: The decision of the Court of Appeals is in direct conflict with the decisions of this Court relating to attorney-client contingent fee contracts.

SECOND: The decision of the Court of Appeals has sanctioned and encouraged a substantial departure by the district court from the accepted and usual course of judicial proceedings relating to attorney-client contingent fee contracts.

THIRD: The decision of the Court of Appeals calls for this Court to exercise its power of supervision to restore the legal profession's willingness to rely on the validity and enforceability of contingent fee contracts which are untainted by fraud, mistake, undue influence, oppression or extortion.

I.

THIS COURT HAS UPHELD ATTORNEY-CLIENT CONTRACTS PROVIDING FOR CONTINGENT FEES UNLESS THEY ARE TAINTED BY FRAUD, MISTAKE, UNDUE INFLUENCE, OPPRESSION OR EXTORTION.

In *Stanton* v. *Embrey*, 93 U.S. 548 (1876), this Court held (pages 556 and 557):

> "Coming to the merits, the first objection of the plaintiffs in error is that the contract set up in declaration is one for a *contingent compensation.* Such a defense, in some jurisdictions, would be a good one; but the settled rule of law in this court is the other way.

Reported cases to that effect show that the proposition is one beyond legitimate controversy. *Wylie* v. *Coxe,* 15 How. 415; *Wright* v. *Tebbitts,* 91 U.S. 252. Professional services were rendered by an attorney, in the first case cited, in prosecuting a claim against the Republic of Mexico, under a contract that the attorney was to receive five percent of the amount recovered. Valuable services were rendered by the attorney during the lifetime of the claimant; but he died before the claim was allowed. Subsequently, the efforts of the attorney were successful; and he demanded the fullfilment of the contract, which was refused by the administrator of the decedent. Payment being refused, the attorney brought suit; and this court held that the decease of the owner of the claim did not dissolve the contract, that the claim remained a lien upon the money when recovered, and that a court of equity would exercise jurisdiction to enforce the lien, if it appeared that equity could give him a more adequate remedy than he could obtain in a court of law.

Courts of law also adopt the same rule of decision, as sufficiently appears from the second case cited, where the same rule of decision was applied and enforced without hesitation or qualification.

* * *

Professional services, to prepare and advocate just claims for compensation, are as legitimate as service rendered in court in arguing a cause to convince a court or jury that the claim presented or the defence set up against a claim presented by the other party ought to be allowed or rejected. Parties in such cases require advocates; and the legal profession must have a right to accept such employment, and to receive compensation for their services; *nor can courts of justice adjudge such contracts illegate, if they are free from any taint of fraud, misrepresentation, or unfairness.*" (Emphasis Added).

Again in *Taylor* v. *Bemiss*, 110 U.S. 42 (1884), this Court upheld and enforced a contingent fee contract and stated (pages 45 and 46):

> "It remains to be considered whether there is in this contract of employment anything which, after it has been fully executed on both sides, should require it to be declared void in a court of equity, and the money received under it returned. It was decided in the case *Stanton* v. *Embrey*, 93 U.S. 548, that contracts by attorneys for compensation in prosecuting claims against the United States were not void because the amount of it was made contingent upon success, or upon the sum recovered.
>
> * * *
>
> This, however, does not remove the suspicion which naturally attaches to such contracts, and where it can be shown that they are obtained from the suitor by any undue influence of the attorney over the client, or by any fraud or imposition, or that the compensation is clearly excessive, so as to amount to extortion, the court will in a proper case protect the party aggrieved."

The district court in the instant case did not and could not find that the contingent fee contract was tainted; that the Petitioners had committed a fraud or exerted undue influence upon their client, Radiant; or that a mistake had been made; or that the amount of the contingent fees, namely 5 1/16% for Fitzgerald, and 1 1/8% for Marino, was oppressive or extortionate. There was no issue or evidence before the district court concerning fraud, undue influence, mistake, oppression or extortion. Yet, the district court, *sua sponte* set aside the contingent fee contract—contrary to this Court's long standing holdings expressed in the *Stanton* and *Taylor* cases, *supra*—and ordered that the Petitioners' fees be set on a quantum meruit basis. The

Court of Appeals affirmed the order of the district court, merely noting that it was not necessary for the district court to even find specifically that the contingent fees provided in the December 20, 1960 contract were unreasonable.

II.

THE LOWER COURTS HAVE CONSISTENTLY FOLLOWED THIS COURT'S DECISIONS IN CONTINGENT FEE CONTRACT CASES.

In *Gray* v. *Joseph J. Brunetti Construction Co.*, 266 F. 2d 809 (3rd Cir. 1959), the Court of Appeals for the Third Circuit reversed a district court which had cut a $13,000.00 contingent fee to $7,500.00 on a quantum meruit basis. The Court of Appeals there stated (page 818):

> "It must be observed, parenthetically, that the District Court erred in still another respect in reducing plaintiff's contingent fee even assuming it enjoyed summary jurisdiction with respect to it. It is settled New Jersey law that attorney-client contracts for contingent fees '* * * should not be carved away by the court except in an entirely clear case'. Hughes v. Eisner, supra, [14 N.J. Super. 58, 81 A.2d 397], and, in the absence of unfairness or fraud, where there has been performance by the attorney, the contract '* * * ought not be disturbed by the court, but the parties should be left where they have placed themselves.' Grimm v. Franklin, 1928, 102 N.J. Eq. 198, 140 A. 236, 239, affirmed E. & A. 1929, 110 N.J. Eq. 573, 146 A. 914."

The Court of Appeals found that the district court (161 F. Supp. 151) had erred in finding as follows (page 154):

> "I adhere to my previous ruling that an agreement for a contingent fee will not be condemned and struck down in absence of evidence that it is excessive or unreasonable to such a degree that it compels a finding that the attorney intended to over-reach. Such is

> not here the case, but the fact that the contingent fee arrangement is not condemned *per se* does not divest this Court of jurisdiction to inquire into its reasonableness. It has long been and still is the law of New Jersey that when a fee agreement between attorney and client is called in question by the client, a Court in the exercise of its equitable discretion will sustain the agreement only to the extent of securing to the attorney reasonable compensation under the case * * *. Soper v. Bilder, Ch. 1917, 87 N.J. Eq. 564, 569, 100 A. 858, 860; Hughes v. Eisner, App. Div. 1951, 14 N.J. Super, 58, 81 A. 2d 394, appeal dismissed, 1951, 8 N.J. 228, 84 A.2d 626."

In *United States* v. *115.1238 acres of Land,* 101 F. Supp. 796 (D.C. N.J. 1951), a New Jersey district court held (page 799):

> "There is nothing in the evidence before me to indicate anything other than that the duly authorized officers of the City, with full knowledge of the facts, and in the absence of any fraud, entered into the contract under no compulsion of any kind, and the contract was the result of their own free will. Numerous cases were set forth in the briefs bearing on the subject of contingent fees. I gather from the cases examined that in the absence of fraud or undue influence, the Courts will not set aside an attorney's contract for contingent fees unless it appears that the fee is exorbitant."

Also, this Court's decision in the *Taylor* case, *supra,* was cited in *Smith* v. *Kingsport Press, Inc.,* 263 F.Supp. 771 (E.D. Tenn. 1966).

In the instant case, only the Petitioner's client, Radiant, could have properly objected to the contingent fee contract of December 20, 1960. However, it did not. The Defendants against whom the attorneys lien was exerted not only did not but could not complain.

In *Hall* v. *Metropolitan Life Insurance Co.*, 298 Ill. App. 83 (1st Dist. 1938), which is the only Illinois decision found on this point, the Court clearly held that in an action to enforce an attorney's lien, where the client did not complain, the defendant against whom the lien was sought, could not contend that the fee contracted for was unreasonable and unconscionable. The Court there said:

> "The first criticism leveled at the judgment is that the contract for a fee of one-third of the amount collected is unreasonable and unconscionable, and in support of its position defendant cites Berkos v. Aetna Life Ins. Co., 279 Ill. App. 243. There Berkos, an attorney, filed a petition for an attorney's lien in a case that arose out of two certificates issued to Candelario de la Rosa under a group life insurance policy, who became ill and died while his claim was pending, and his father was granted permission to intervene and filed an answer contesting the claim of Attorney Berkos. That case is not in point. The father of insured had a clear right to raise his voice in objection to the reasonableness of the fee sought. In the case before us the dispute is between the attorney and the corporation against which he asserts a lien. The client, Grace Smith, appeared only as a witness and did not challenge the claim of plaintiff for the enforcement of a lien against defendant. Defendant is not in a position to contend that the fee contracted for was unreasonable and unconscionable."

Moreover, the Respondents, Freeman and Levy, (who received 50% of the $450,000.00 cash settlement for their attorney's fees) together with Levy's father-in-law, Neumark, signed and approved the contingent fee contract. They did not at any time contend that the contract was inconsistent with the Canons of Ethics as found by the district court and affirmed by the Court of Appeals, and they could not so contend.

The Standing Committee on Professional Ethics of the American Bar Association, in Informal Opinion No. 870, dated August 4, 1965, stated as follows:

> "It is the decision of the Committee that the attorney should not interpose as a reason for not carrying out the agreement he made that the agreement was not ethical. This matter of ethics should have been recognized and adhered to by the attorneys before they entered into the agreement. When two lawyers have participated in an unethical agreement one of them should not, where no one else is involved, set up the unethical agreement against the other."

A copy of the above opinion is shown in the appendix to this Petition as Exhibit D.

Attorneys cannot risk taking cases on a contingent fee basis in the face of the decision of the Court of Appeals in this case. As consistently held by this court, in the absence of over reaching on the attorneys' part, whether it be called fraud, mistake, undue influence, oppression, extortion or just plain "unreasonableness", the contingent fee contract should be honored.

The amount involved in this case, namely $10,845.55 (the difference between the Petitioners' percentage of the $450,000.00 cash settlement called for under the contingent fee contract and the $17,500.00 awarded the Petitioners on a quantum meruit basis), plus the percentage of the value of the AGA approval of Radiant's gas burner (which Petitioners claim to be part of the settlement) is important only to the Petitioners. However, the adverse affect which this case can have on private litigants in treble damage anti-trust, personal injury and other cases customarily

handled by attorneys on a contingent fee basis may well be disastrous. How many of these litigants can afford to compensate an attorney on an hourly or other non-contingent basis? On the other hand, how many attorneys can afford to take such cases on a contingent fee basis with the future uncertainty generated by the decisions of the district court and Court of Appeals in this case.

CONCLUSION

For the reasons herein assigned, this Court ought, in the interest of the appropriate administration of attorney-client contingent fee contracts, grant a Writ of Certiorari in this case.

Respectfully submitted,

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